

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 13, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP583**

**Cir. Ct. No. 2012FA22**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**BONNIE KATHLEEN KELLY,**

**PETITIONER-RESPONDENT,**

**V.**

**MICHAEL DENNIS KELLY,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Pierce County:  
JOSEPH D. BOLES, Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Michael Kelly, pro se, appeals his divorce judgment, arguing the circuit court erroneously exercised its discretion in the

property division. We affirm. We deny Bonnie Kelly's motion seeking costs and fees for a frivolous appeal.

¶2 The parties were married less than five years. A final divorce hearing was held on October 12, 2012. At the time of the divorce, Bonnie was employed in the clerical field and Michael was a warehouseman. The circuit court denied maintenance to both parties. Essentially, the court attempted to award each party the property they brought into the marriage and associated debt. In awarding the residence to Bonnie subject to any debt thereon, the court noted Bonnie brought the residence into the marriage, and that the property lost value during the marriage due to the real estate market. The court also awarded Bonnie certain accounts and inherited antiques, household items owned prior to the marriage, pension funds from a previous marriage and social security she received on behalf of her minor daughter. Michael was awarded personal property he brought into the marriage, together with his interest in retirement plans and accounts in his name. Michael now appeals.

¶3 The division of property rests within the sound discretion of the circuit court.<sup>1</sup> *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the court examined the relevant facts, applied a proper standard of law, and using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Liddle v.*

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<sup>1</sup> Bonnie uses the phrase "abuse of discretion." We have not used that phrase since 1992, when our supreme court replaced that phrase with "erroneous exercise of discretion." See *Shirk v. Bowling, Inc.*, 2001 WI 36, ¶9 n.6, 242 Wis. 2d 153, 624 N.W.2d 375.

*Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). Findings of fact will be affirmed unless clearly erroneous. WIS. STAT. § 805.17(2).<sup>2</sup>

¶4 Michael takes umbrage with the circuit court’s property division. He alleges, “The trial [was] one-sided, as if pre-determined outcome, based on one side’s information ....” He also asserts the court failed to consider his earnings and contributions during the marriage. In this regard, we note Michael testified at trial, but called no witnesses and offered no exhibits. He also did not file a financial statement. He now effectively asks this court to retry the case. We will not independently review the evidence and rulings as if we were the trial court.

¶5 The trial court, not the appellate court, is the ultimate arbiter of the weight of the evidence and the credibility of the parties. *See id.* The trial court gave explanations concerning why it treated the premarital assets and debt in the manner in which it did. The court was not obligated to accept Michael’s version of facts. The record reflects the court’s consideration of appropriate statutory factors, and its findings are not clearly erroneous. The court engaged in a rational and reasoned analysis that was a proper exercise of discretion.

¶6 Michael also argues the circuit court engaged in ex-parte communications. These serious allegations are unsupported by the record on

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<sup>2</sup> References to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

appeal and will not be further considered. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).<sup>3</sup>

¶7 Finally, Bonnie seeks costs and fees for a frivolous appeal. Bonnie contends Michael “continues to harass Bonnie Kelly almost a year after their divorce by filing numerous motions and this appeal.” By way of example, Bonnie notes that Michael filed a motion to release “Closed Door Meeting Notes” from a purported conversation with an attorney for First National Bank prior to the issuance of the circuit court’s written decision on property division. The court denied the motion stating, “[T]here was no meeting of any kind with anyone regarding any matter related to this case.” Bonnie argues the court found the motion frivolous, yet Michael raised this issue again on appeal.

¶8 This court will not condone baseless filings for the purpose of harassment or obfuscation. However, we have not been provided a sufficient factual basis in this instance to conclude Michael filed this single appeal solely for the purpose of harassing or maliciously injuring another, nor can we conclude the entire appeal was frivolous. *See* WIS. STAT. RULE 809.25(3)(c).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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<sup>3</sup> Michael also suggests the circuit court improperly requested Bonnie’s attorney to draft proposed findings of fact, conclusions of law and judgment. Michael claims the court itself should have drafted the documents. However, it is a common practice in circuit courts to request one party to draft proposed findings, conclusions and judgments subject to the court’s review and approval. Moreover, the court’s written decision regarding the property division was itself appended to the proposed document, incorporated by reference, and made the judgment of the court.

